No. 89-912

In The

Supreme Court of the United States

October Term, 1989

BETH BABCOCK, by and through her guardian; ERIKA BABCOCK; and ANGELA LONG,

Petitioners,

v.

WANDA TYLER and MARK BRONSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this case of first impression, is a caseworker entitled to absolute immunity under 42 U.S.C. § 1983 for having conducted a constitutionally inadequate investigation of a dangerous prospective foster father and having placed foster children in the foster father's care where he subsequently abused them sexually, by reason of the fact that the placement was approved by a juvenile court without knowledge of the inadequate investigation?

2. Is a caseworker entitled to absolute immunity for having failed to protect foster children from abuse inflicted by a foster father by reason of the fact that a juvenile court conducted periodic reviews of the children's continued foster care placement?

LIST OF PARTIES

The parties to the proceedings and before this Court are not the same.

Petitioners:

Beth Babcock, a minor, by and through Rudolph G. Babcock, her guardian and father.

Erika Babcock, who has reached the age of majority since the commencement of this action.

Angela Long.

Respondents:

Wanda Tyler, a caseworker employed by the Washington Department of Social and Health Services.

Mark Bronson, a caseworker employed by the Washington Department of Social and Health Services.

Other Parties:

Rudolph G. Babcock, a plaintiff below in his individual capacity. He is the father of Beth Babcock and Erika Babcock, and the stepfather of Angela Long.

Willis and Elizabeth Babcock, husband and wife, were plaintiffs below. They are the parents of Rudolph Babcock and the grandparents of Beth Babcock and Erika Babcock.

Arthur J. Bieker, attorney at law, was a defendant below. He acted as a court-appointed attorney for petitioners in the juvenile court proceedings. The claims against him were voluntarily dismissed.

LIST OF PARTIES – Continued

Lee Edward Michael, an uncle to petitioners, and a defendant below. An order of default has been entered against him below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Beth Babcock, by and through her guardian, Erika Babcock and Angela Long respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 6, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 884 F.2d 497, and is reprinted in the appendix, App. 1-17, *infra*.

The opinion and order of the United States District Court for the Eastern District of Washington (Myers, Magis.) has not been reported. It is reprinted in the appendix, App. 18-39, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. §1254(1). This petition is filed within 90 days from the entry of the judgment below on September 6, 1989.

STATUTE INVOLVED

42 U.S.C. §1983.

STATEMENT OF THE CASE

The instant case involves three girls in foster care in the state of Washington – sisters Beth and Erika Babcock and their half-sister Angela Long – who were repeatedly raped, sodomized, and sexually assaulted by their foster father over an eighteen-month period, from May or June, 1982, to October 31, 1983, beginning when they were six,

eight, and twelve years old, respectively. The District Court held that a jury could have determined that the abuse could have been avoided entirely if the state foster care caseworker who supervised the girls had simply checked the foster father's criminal record. (App. 21)

The foster father, Lee Michael, was an unemployed alcoholic who had been convicted of armed robbery, probation violations, drunk driving, and traffic violations, and charged with raping a 63-year-old widow and sexually assaulting a friend of his wife. (CR 289, Ex. 26) In addition to abusing the three petitioners in this case, he also raped a fourth foster child and his own daughter. (App. 6) He was ultimately convicted of multiple counts of rape and sexual abuse, (CR 289, Ex. 48) and is currently incarcerated in a state prison.

The caseworker, respondent Wanda Tyler, knew of Michael's alcoholism and unemployment when she selected him to be the foster father. (Supp. ER 241-42) She conducted a cursory investigation of him, consisting of only one interview, which she termed a "home study." (Supp. ER 79, 232-33) In the home study, Tyler failed to ask Michael about his criminal background, though the questionnaire that she and all other workers in the agency used required that that question be asked. (Supp. ER 233) She failed to check records which were readily available in her own agency's office, and which would have revealed Michael's criminal history. (Supp. ER 190) She failed to interview anyone other than Michael. And she placed the children in Michael's home even though she did not license Michael as a foster parent.

Tyler knew that Michael had previously sought custody of the girls in the state of Louisiana and that the Louisiana court had rejected his bid. (App. 25) She knew that, after this rejection, Michael had returned to Washington and tried to encourage the girls to leave their foster home and come to live with him. (Supp. ER 63, 67-68, 78) Tyler's supervisor had told Michael that he should stay away from the girls because he was a disruptive influence on them. (CR 289, Ex. 31) Nevertheless, as the District Court found, Tyler encouraged Michael in his efforts by not only permitting Michael to arrange surreptitious meetings with the girls, but also by advising the girls not to tell anyone about these meetings. (ER Tab J 12)

When Michael made allegations about the girls' father and about prior events in the girls' lives, (Supp. ER 61, 65, 67, 76) Tyler failed to check those allegations. (Had she done so, she would have learned that Michael's allegations were untrue.) Instead, Tyler submitted those allegations as "background information" in her report to the Washington Juvenile Court, (Supp. ER 236) as if she had verified their accuracy. It was this report, and its recommendation that the children be moved to Michael's home, that the juvenile court accepted. The subsequent move set the stage for all the abuse which followed.

Petitioner Beth Babcock, her sister Erika, and her half-sister Angela Long had entered foster care in August, 1981, in the state of Washington, following an order issued by a Louisiana court in a dependency proceeding brought in that State. (ER Tab A) Angela's sister Aryn, who is not a party to this matter, entered foster

care along with the other three girls. Prior to the initiation of the Louisiana dependency proceeding, the four minor girls had been living in the state of Louisiana with Rudolph Babcock, who is the father of Erika and Beth and the stepfather of Angela and Aryn.

Petitioners concede for purposes of this appeal that when the girls arrived in Washington, they were under the "care, custody and control" of the Washington Department of Social and Health Services ("DSHS")[1] (App. 26) DSHS assigned respondent Wanda Tyler, one of its caseworkers, to supervise the four girls. (CR 139, Ex. 21)

Initially all four girls lived in the home of Rudolph Babcock's parents, but, within the next four months, Tyler moved Angela to two different foster homes. DSHS did not seek court approval or ratification of either move; having custody and control of the children, the agency claimed that it had no legal obligation to do so. (App. 26) During the same time period, Tyler conducted her home study of Lee Michael and his wife Janet, who was the sister of all four girls' deceased mother. (Supp. ER 236)

On March 31, 1982, in a routine Juvenile Court review to determine "the efforts which [the girls' father] ha[d] made to correct the conditions which led to removal [of his daughters]," pursuant to RCW 13.34.130(3)(a),

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[1] Petitioners had disputed that issue below, and the District Court did not resolve it. (See discussion at App. 28.) Respondents have always contended that the Louisiana order gave DSHS "care, custody, and control," such that DSHS did not need court approval to change foster homes.

DSHS submitted a report from Tyler which recommended, among other things, that the children reside with Michael. (Supp. ER 240)

At this review, the Juvenile Court Commissioner, after engaging in a brief colloquy with the DSHS attorney, approved Tyler's recommendation that Aryn and Angela reside in the Michaels' home.

> Mr. Miller [attorney]: You should have a home study in your file, your Honor.
>
> Court: And they are recommending it?
>
> Mr. Miller: Yes, sir.
>
> Court: I will honor that. (CR 289, Ex. 13).

Tyler immediately moved Angela and Aryn into Michael's home. She then transferred the children's case to respondent Mark Bronson, also a DSHS caseworker. On April 19, 1982, Bronson moved Beth and Erika into Michael's home. (App. 5) By May or June, 1982, Michael had begun raping Aryn, Beth, and Erika, and sexually molesting all four of the girls.

On May 4, 1982, the Juvenile Court again reviewed the status of the dependency. (CR 139 Ex. 14) At the conclusion of that review, again without taking testimony, the court ratified the move of Erika and Beth to Michael's home. (CR 139 Ex. 14)

In August, 1982, the Juvenile Court held another review, at which Rudolph Babcock sought to regain custody of the girls or, alternatively, to have them moved to foster care in Wisconsin, where he resided. This was the first hearing in Washington at which any sworn testimony was taken.

At the review, Bronson testified to his work on the girl's case, which did not include any follow-up investigation on Michael's background. Babcock cross-examined Michael regarding Michael's hostility to Babcock and his refusal to help reunify the family. No one produced evidence as to Michael's criminal record, alcoholism, employment problems, or sexual abuse of the girls. At the end of the hearing, the court agreed to Bronson's request that the children remain in the Michael home.

Michael continued his sexual assaults upon all four girls. Respondent Bronson, though charged with the duty to supervise and monitor the children in Michael's home, failed to do so. It was not until October 31, 1983, that the authorities learned of the abuse and removed the girls from Michael's home. (Supp. ER 137) Michael's arrest, conviction, and incarceration followed.

Petitioners commenced this damage action under 42 U.S.C. §1983 in March, 1984, in the United States District Court for the Eastern District of Washington. Petitioners claimed that respondents violated their Fourteenth Amendment liberty interest in being free of harm while in the state's custody by placing petitioners in a dangerous foster home after having conducted a constitutionally insufficient and professionally deficient investigation of the foster father; and by subsequently failing to protect the children from the sexual abuse which the foster father inflicted upon them. (Petitioners included other federal and state claims which they do not raise in this Court.)

On January 11, 1988, the Eastern District entered an opinion and order on cross-motions for summary judgment. The court upheld the legal and factual sufficiency of petitioners' constitutional claims, relying upon *Doe v. New York City Dept. of Soc. Serv.*, ("Doe I"), 649 F.2d 134 (2d Cir. 1981) and *Doe v. New York City Dept. of Soc. Serv.*, ("Doe II"), 709 F.2d 782 (2d Cir.), *cert. den.* 464 U.S. 864 (1983); and *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir.) *cert. den.*, ___ U.S. ___, 109 S.Ct. 1337 (1989). The court found that "it seems clear that the girls have a protected right to be free from the harm which befell them here." (App. 19). Under a standard of either deliberate indifference, as enunciated by this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), or substantial departure from professional standards, *Youngberg v. Romeo*, 457 U.S. 307 (1982), the court held that petitioners possessed sufficient evidence to submit the claim to a jury. (App. 21)

The Eastern District also denied respondents' motion for summary judgment on absolute and qualified immunity. (App. 35-37) The respondents appealed this part of the order to the Ninth Circuit, invoking appellate jurisdiction under 28 U.S.C. §1291 and the collateral order doctrine as applied to the denial of immunity in *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Respondents' appeal was limited to the issue of absolute immunity.[2] The Ninth Circuit reversed and dismissed

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[2] However, the Ninth Circuit law is that the state has the affirmative constitutional obligation to protect the welfare of children in its care. *Lipscomb v. Simmons*, 884 F.2d 1242, 1247 (9th Cir. 1989). Previously, in *Gibson v. Merced County Department of Human Resources*, 799 F.2d 582, 589 (9th Cir. 1986), the court had assumed, without deciding, the existence of this right.

the case. It held that respondents had absolute "quasi-prosecutorial" or "quasi-judicial" immunity for placing the petitioners in a dangerous foster home and for subsequently failing to protect them from the assaults by the foster father. (App. 14) As a matter of public policy, the court found that caseworkers required absolute immunity "to permit them to perform their duties without fear of even the threat of section 1983 litigation." (App. 15)

REASONS FOR GRANTING THE WRIT

I.

A Uniform National Standard For Caseworker Immunity Is Needed.

This Court has addressed the entitlement to absolute immunity for numerous types of government employees, such as police officers, parole officers, administrative law judges, public defenders, prosecutors and judges. These cases have provided uniform precedent to lower courts in cases where those officials claim immunity. This Court has yet to address the issue of the existence and extent of immunity for foster care caseworkers.

More than 250,000 children are presently in foster care in the United States, according to information from the Child Welfare League of America. Almost all of them are in foster care systems which are similar to Washington's in ways material to this case.

Most placements of children in foster care begin with a court proceeding and involve subsequent periodic court

reviews.[3] Federal law encourages such proceedings, since it prohibits states from obtaining federal reimbursement for foster care of children unless those children are placed in care by a court order, 42 U.S.C. §§672(a)(1), 672(e) (1980), and have reviews of their placements at least once every six months. 42 U.S.C. §675(5)(B) (1980) The purpose of these reviews is for the court to determine whether the parents are able to care for the child, and whether the agency has made "reasonable efforts . . . to make it possible for the child to return to his home . . . " 42 U.S.C. §671(a)(15), to further Congressional reunification goals. The purpose of the hearings is not for the court to determine the suitability of the foster parents or whether the foster parents are caring for the child properly; that is the responsibility of the caseworkers.

Like petitioners in this case, a disturbing number of foster children are physically and/or sexually abused by their foster parents. See, e.g., discussion in *B. H. v. Johnson*, 715 F.Supp. 1387, 1392 (N.D. Ill. 1989); *L. J. v. Massinga*, 838 F.2d 118 (4th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 816 (1989).

The decision of the court below has potentially grave consequences for all of these children. According to the court, government-employed caseworkers are entitled to absolute immunity for all acts and omissions which they take with respect to foster children because those actions

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[3] For a compilation and discussion of relevant state laws, see J. W. K. International Corp., *Comparative Study of State Case Review Systems* (1982); National Council of Juvenile and Family Court Judges, *The Judicial Review of Children in Placement Handbook* (1981).

are necessarily "taken in connection with, and incident to, ongoing child dependency proceedings." (App. 14) This holding potentially grants absolute immunity to virtually all actions taken by virtually all caseworkers with respect to foster children in all states which receive federal foster care funds.

II.

The Decision Below Conflicts With A Decision Of This Court.

This Court has denied immunity in a factually analogous circumstance. In *Malley v. Briggs*, 475 U.S. 335 (1986) a police officer allegedly conducted a constitutionally insufficient criminal investigation, and requested and received an arrest warrant based upon that investigation by submitting to a magistrate an affidavit lacking in probable cause. In the ensuing §1983 damage action, which the arrestee brought after a grand jury failed to indict him, the police officer claimed absolute immunity, arguing that his acts were functionally equivalent to those of a prosecutor or a complaining witness. This court rejected the comparison with a prosecutor because requesting a warrant is further removed from the judicial process than is a grand jury proceeding. *Id.* at 342-43.

Similarly, in the case at bar, the respondents argue that they have absolute immunity because their actions were equivalent to functions performed by a prosecutor. However, like the police officer's unconstitutional acts in *Malley*, respondents' unconstitutional conduct in failing to secure a safe environment for petitioners and failing to

protect the children from injury occurred completely outside the context of the judicial proceeding.

The police officer in *Malley* also argued that he should be shielded from liability because the magistrate's issuance of the warrant rendered the officer's conduct *per se* reasonable. Although the officer made this argument in the context of qualified immunity, it is substantially identical to respondents' principal contention in the instant matter that they are absolutely immune because the juvenile court accepted their recommendation to place the children with Michael. This Court, in rejecting Malley's argument, exposed the fallacy of the officer's attempt to hide behind the immunity of the judge: "If the magistrate issues the warrant [without probable cause], his action is . . . an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n. 9.

No meaningful distinction exists between the police officer's claim for immunity in *Malley* and the caseworkers' claim of immunity here. The actionable conduct in *Malley* was the investigation of a crime leading to the issuance of an arrest warrant by a judge. The actionable conduct here was the investigation of a prospective foster home leading to a court-approved placement of foster children, followed by failure to supervise that home and to protect the children from an abusive foster father. Both cases involved unilateral investigations followed by judicial decisions relying upon those investigations. In fact a police officer has a more persuasive argument for immunity than a caseworker because the analogy to a prosecutorial function has "some force." *Id.* at 343.

The court below all but ignored this Court's decision in *Malley*. (App. 11) The court did not carefully scrutinize the caseworker's precise function in investigating the suitability of Michael and compare that function to a prosecutor, witness or judge, as this Court carefully analyzed a police officer's function in investigating a crime and seeking an arrest warrant. Instead the court below swept aside the rationale in *Malley* and broadly extended absolute immunity to shield all of a caseworker's responsibilities to a child in foster care, not merely those responsibilities which are "intimately associated" with the judicial phase of foster care. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

III.

The Decision Below On This Important Issue Of Public Policy Ignored This Court's Prior Rulings

This Court's careful and cautious "approach to questions of immunity under §1983 is by now well established." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Because §1983 "on its face admits of no immunities," *Id.*, all new claims of absolute immunity must be carefully and precisely analyzed under this Court's approach. This Court has admonished that no room exists for the type of "free-wheeling policy choices" made by the court below in the instant case. *Id.* at 342.

A. Common Law Immunities

The first step in determining the existence of absolute immunity under §1983 is to determine whether the

defendant "was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871 . . . " *Malley v. Briggs*, 457 U.S. 335, 340 (1986); *Tower v. Glover*, 467 U.S. 914, 924 (1984). The court below did not consider this issue. In fact, caseworkers were not immune from liability at common law because they did not exist in 1871. The first child welfare organization in the United States, the Society for the Prevention of Cruelty to Children, was not founded until 1874.[4] Moreover, there is authority supporting the lack of immunity at common law for individuals in a position similar to caseworkers: guardians of orphans. See, discussion of common law liability in *Eugene D. v. Karman*, ___ F.2d ___, 1989 WL 135366 (6th Cir., Nov. 13, 1989) (Merritt, C. J., dissenting).

The lack of common law immunity may itself be sufficient to preclude a finding of absolute immunity for caseworkers. A court cannot create immunities where none existed before, solely because of what it considers "to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 923 (1984). In failing to analyze the historic immunity of caseworkers, the court below ignored this Court's analytic framework for assessing claims of immunity.

B. Public Policy.

As a matter of public policy, this Court has been "quite sparing" in the extension of immunity because of the "undeniable tension between official immunity and the ideal of the rule of law." *Forrester v. White*, 484 U.S. 219, 223-224 (1988). "For executive officers in general, . . . qualified immunity represents the norm." *Harlow v.*

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[4] H. Kempe and R. Helfer, *The Battered Child* (1980), p. ix.

Fitzgerald, 457 U.S. 800, 807 (1982). This Court has refused to provide absolute immunity to state governors, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); Cabinet officers, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and members of prison disciplinary committees, *Cleavenger v. Saxner*, 474 U.S. 193 (1985).

The court below, in determining that caseworkers are entitled to absolute immunity, ruled that they performed a "quasi-judicial" or "quasi-prosecutorial" function. The fact that the court below could not decide whether the function was judicial or prosecutorial tends to indicated that it was neither. That fact also demonstrates how broadly and dramatically the court below extended the doctrine of absolute immunity. Several other factors, which the court below failed to consider, might also lead to the conclusion that the caseworkers performed neither a "quasi-prosecutorial" nor a "quasi-judicial" funtion.

First, this Court has held that those seeking absolute prosecutorial immunity must perform functions "intimately associated with the judicial phase of the *criminal* process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). (emphasis added) This immunity both protects the integrity of the criminal process and stems from the common law immunity of prosecutors in criminal proceedings.

Proceedings to interfere with parental rights are not criminal proceedings, and this Court has so recognized. *Santosky v. Kramer*, 455 U.S. 745, 768 (1982); *Lassiter v. Department of Social Services of Durham County, North Carolina*, 453 U.S. 18 (1981). Because of the underlying differences between criminal and dependency proceedings, absolute immunity may not be appropriate for the latter

while it is for the former. The Court below, in its haste to find absolute immunity, failed to consider these differences.

Second, proceedings to interfere with parental rights are not part of the common law; they are in derogation of the common law. *Matter of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), app. dismissed sub nom. *Orsini v. Blasi*, 423 U.S. 1042 (1976). The historic considerations which protect the integrity of the criminal process, mandating absolute immunity for prosecutors, do not exist for those who bring dependency proceedings. Several Circuits have concurred, holding that when caseworkers remove children from their parents, the caseworkers perform a function more closely analogous to police officers than to prosecutors and therefore are not entitled to absolute immunity. See Point IV, infra. Accordingly, a careful analysis is needed before deciding to extend immunity to an entirely new class of individuals.

Third, the functions of the government official seeking immunity must be truly analogous to the duties of judges or prosecutors. *Butz v. Economou*, 438 U.S. 478, 514-15 (1978). The Court has declined to grant absolute immunity when those functions are not. Thus, while a prosecutor have absolute immunity in prosecuting a case, *Imbler v. Pachtman*, 424 U.S. 409 (1986), he does not have absolute immunity in authorizing wiretaps. *Mithchell v. Forsyth*, 472 U.S. 511 (1985). Even a judge, who has absolute immunity for all his decisions, *Stump v. Sparkman*, 435 U.S. 349 (1978), loses that immunity when he decides to fire an employee. *Forrester v. White*, 484 U.S. 219 (1988). And a police officer, who has absolute immunity when testifying in a criminal trial, *Briscoe v. Lahue*, 460 U.S. 325

(1983), does not have absolute immunity for presenting a warrant request to a magistrate. *Malley v. Briggs*, 475 U.S. 335 (1986).

Certiorari should be granted where a circuit court has failed to follow this Court's "well established" approach in an important case of first impression. The immunity issue centers around whether the caseworkers' conduct, in investigating Michael as a prospective foster parent and failing to supervise or monitor the children after they were in Michael's home, was so "intimately associated" with the juvenile court proceeding to deserve extension of absolute immunity for that conduct. The Ninth Circuit failed to engage in the necessary careful analysis.

Here, Tyler unilaterally decided to conduct a home study of Lee Michael and then made the sole judgments concerning how it would be done. The juvenile court neither ordered nor supervised that home study. Tyler's failure to inquire into Michael's criminal background was never before the juvenile court, and petitioners had no way of knowing about Tyler's omissions. Tyler's report did not contain evidence of Michael's criminal background, nor did it describe the scope or adequacy of Tyler's investigation. In fact Tyler admitted that if she had discovered Michael's criminal background she would not have recommended the placement.

It is undisputed that in failing to conduct a rudimentary criminal background check, Tyler was not acting as an "advocate" in the courtroom and her background

investigation was not subjected to the rigors of the adjudicatory process. Similarly, respondents' failure to supervise the children in Michael's home and to protect them from his sexual assaults was never part of the juvenile court proceeding.

More importantly, the court below ignored this Court's careful analytical framework. In failing to engage in the careful analysis of the caseworkers' functions in initially investigating and subsequently supervising the Michael home, the court below ignored this Court's prior rulings.

IV.

The Circuits Conflict As To The Immunity Of Foster Care Caseworkers.

Not only does the Ninth Circuit opinion conflict in principle with *Malley*, but it conflicts with decisions on caseworker immunity from other circuits as well.

The recent proliferation of cases on the issue of caseworker immunity demonstrates the present need for this Court's guidance. Most circuits have followed the analytical framework mandated by this Court, and have carefully limited immunity to cases where the particular function of the caseworker is "intimately associated with the judicial phase" of a dependency proceeding and not to cases where caseworkers function like police officers. *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989) (no absolute immunity for investigating a complaint of child maltreatment); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (no absolute immunity for removing a child); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988) (no

absolute immunity for removing a child); *Austin v. Borel*, 830 F.2d 1356 (5th Cir. 1987) (no absolute immunity for removing a child from the child's parents without court order); *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987) (no absolute immunity for removing a child); *Malachowski v. City of Kiene*, 787 F.2d 704 (1st Cir.) *cert. denied* 479 U.S. 828 (1986) (absolute immunity for the "quasi-prosecutorial" removal of children); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) (absolute immunity).

Two circuits have recently decided cases in which foster children sued, claiming that foster care caseworkers failed to protect them from dangerous foster parents. In both *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989), reh. den. October 26, 1989, and *Eugene D. v. Karman*, ___ F.2d ___, 1989 Westlaw 135366 (6th Cir. 1989) the courts ruled that the caseworkers were entitled to qualified immunity because the foster child's right to protection was not clearly established at the times of the injuries. The attorneys for the plaintiff Brenda Doe have informed counsel of record for petitioners in the instant matter that they intend to file a petition for certiorari in this Court.

Most, if not all, of the other decisions have followed the analytical framework mandated by this court for determining claims of absolute immunity. In the instant case, by contrast, the court below abandoned that framework. It based its ruling upon the freewheeling policy assertion that caseworkers' "immunity must be absolute to permit them to perform their duties without fear of even the threat of section 1983 litigation." (App. 15) In so doing, the court drastically expanded its prior rulings on

caseworker immunity, and ignored the rules of law established by this Court and by the other circuits.

CONCLUSION

This Court should answer the call to provide uniform national precedent on the issue of immunity for caseworkers. The petition should be granted.

Respectfully submitted,

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December 5, 1989.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDOLPH BABCOCK, individually and as guardian for two minor children, Beth Babcock and Erika Babcock; ANGELA LONG; WILLIS BABCOCK AND ELIZABETH BABCOCK and ELIZABETH BABCOCK, husband and wife, *Plaintiff-Appellees,* v. WANDA TYLER; MARK BRONSON, in their individual capacities, *Defendants-Appellants,*	No. 88-3521 D.C.No. CV-84-271-SPM OPINION

Appeal from the United States District Court
For the Eastern District of Washington
Smithmore, P. Myers, Magistrate, Presiding

Argued and Submitted
May 4, 1989 – Seattle, Washington

Filed September 6, 1989

Before: Arthur L. Alarcon and David R. Thompson, Circuit Judges, and A. Wallace Tashima, District Judge.*

Opinion by Judge Thompson

*Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Courts and Procedure

Reversing and remanding the district court's judgment with instructions to dismiss, the court held that Washington Department of Social and Health Services caseworkers are entitled to absolute immunity.

Appellee Rudolph Babcock, on behalf of himself and the two Babcock girls and Angela Long, filed a civil rights action pursuant to 42 U.S.C. § 1983 against Washington DSHS caseworker appellants Wanda Tyler and Mark Bronson. Tyler and Bronson performed investigative and placement services in child dependency proceedings which had been transferred from Louisiana to Washington. Consistent with a recommendation of the DSHS, the girls were placed in the home of Lee and Janet Michael, Lee Michael sexually abused the children, and it was discovered later that he had a prior criminal record which included charges of forceable and attempted rape and sexual assault. No inquiry was made concerning his criminal record during the caseworker's investigation. The district court determined that Tyler and Bronson were not entitled to absolute immunity.

COUNSEL

Owen F. Charke, Jr., Senior Assistant Attorney General, and Michael E. Grant, Assistant Attorney General, Spokane, Washington, for the defendants-appellants.

Michael R. Seidl, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Oregon, and Robert J. Crotty, Lukins & Annis, Spokane, Washington, for the plaintiffs-appellees.

OPINION

THOMPSON, Circuit Judge:

In this case we consider whether Washington Department of Social and Health Services ("DSHS") caseworkers are entitled to absolute immunity. The caseworkers performed investigative and placement services in child dependency proceedings which had been transferred to Washington from Louisiana pursuant to interstate compact. Consistent with a recommendation of the DSHS, the Washington court placed the children in the home of Lee and Janet Michael. Lee Michael sexually abused the children. He had a prior criminal record which included charges of forceable rape, attempted rape and sexual assault. No inquiry was made concerning this criminal record during the caseworker's investigation. Had it been, the criminal record would have been discovered.

In this ensuing lawsuit which was brought pursuant to 42 U.S.C. § 1983, the district court determined that the caseworkers were not entitled to absolute immunity, denied their motion to dismiss and denied their motion for summary judgment. Relying on principles we articulated in *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154 (9th Cir.), *cert. denied*, 108 S. Ct. 98 (1987), and *Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758 (9th Cir. 1987), we concluded that the caseworkers are entitled to absolute immunity; and we reverse.

FACTS

Rudolph and Ann Long Babcock were married in 1970. Their family included four children: Erika and Beth

Babcock, and Angela and Aryn Long. Ann was the natural mother of all four girls. Aryn and Angela ("the Long girls") were Ann's children form a prior marriage. Rudolph was the natural father of Erika and Beth ("the Babcock girls"). Ann committed suicide in 1978. All four children continued to live with Rudolph. He remarried, but the marriage lasted less than a year. Rudolph was apparently unable to care for the children alone, and in July 1981 the Louisiana Department of Health and Human Resources obtained an order of dependency which mandated removal of the children from Rudolph's care and custody. Following a four-day hearing, the Louisiana court ordered all four girls placed with Rudolph's parents, Willis and Elizabeth Babcock, who were residents of Richland, Washington. The Louisiana court ordered the Louisiana Department of Health and Human Resources to transfer the case to Washington. The girls arrived at the elder Babcocks' home in Washington about three weeks later. Rudolph also moved in with his parents.

On October 7, 1981, the Louisiana court ordered Rudolph to leave his parent's home and to reside apart from the girls. He did so, traveling to Wisconsin where he established a new residence. On the same date, the Louisiana court formally relinquished jurisdiction on condition that Washington accept jurisdiction of the case.

On November 5, 1981, the Washington DSHS requested and obtained from the Washington juvenile court an order by which Washington accepted jurisdiction. The Washington court order contained recitals that it was based on a finding of dependency having been made by the Louisiana court; a dispositional order having been entered by the Louisiana court placing the children with

the elder Babcocks in the State of Washington; appropriate interstate compact proceedings having been instituted by Louisiana; the Washington court's review of the case record to the date of its order; and the agreement of the parties.

Following Washington's acceptance of jurisdiction, a dependency disposition hearing was held in the Washington juvenile court on March 31, 1982. Rudolph Babcock obtained a continuance of the hearing as to the Babcock girls. The court entered a "temporary order" placing the Long girls in the home of Lee and Janet Michael, Janet Michael is the sister of the Long girl's natural mother, Ann Long Babcock.

Meanwhile, back in February 1982, Rudolph Babcock had removed the Babcock girls from his parents' home taking them to his new home in Wisconsin. A Wisconsin court granted full faith and credit to a Washington order of requisition and remanded the Babcock girls to the custody of the Washington DSHS. The Babcock girls returned to Washington on April 19, 1982. By that time the Long girls had been placed in the home of Lee and Janet Michael. Washington caseworker Mark Bronson, acting without a court order placed the Babcock girls there as well.

On May 4, 1982, a second hearing was held before the Washington juvenile court in the Long/Babcock girl's case. In her report, Wanda Tyler, a DSHS caseworker, recommended that all four girls remain with the Michaels. Rudolph objected to this recommendation, and the case was continued for further hearing. Pending the continuance, the court determined that the girls should remain with the Michaels.

The record indicates that several hearings were held thereafter as Rudolph Babcock continued his efforts to regain custody of his daughters. These efforts proved unsuccessful. As late as September 1983, the Washington DSHS reported that the girls were "fitting in very well" in the Michaels' home, and counselors who conducted psychological examinations were convinced that the girls were experiencing family stability. The Long and Babcock girls remained in the Michaels' home until October 1983, when it was discovered that Lee Michael had sexually abused all four girls, in addition to his own daughter. Lee Michael was arrested and subsequently convicted on three counts of statutory rape and two counts of indecent liberties. He is presently serving a 55-year sentence.[1]

In 1984, Rudolph Babcock, on behalf of himself and the two Babcock girls, and Angela Long, one of the Long girls, filed in the district court a civil rights action pursuant to 42 U.S.C. § 1983 against Washington DSHS caseworkers Wanda Tyler and Mark Bronson.[2] The plaintiffs alleged deprivation of their first amendment right of family association, violation of the children's fourteenth amendment liberty interests in being free from harm

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[1] After the departure of Lee Michael, the Long and Babcock girls asked to be allowed to continue living with Janet Michael. They were permitted to do so. In December 1983, following a successful home study, the two Babcock girls were returned to the custody of Rudolph, who had moved to Oklahoma. Aryn and Angela Long continued in the custody of Janet Michael until they reached the age of majority. *Babcock v. State*, 768 P.2d 481, 486 n.1 (Wash. 1989).

[2] The elder Babcocks, Willis and Elizabeth, the grandparents of the Babcock girls, initially joined in the lawsuit. Their claims, however, were dismissed with prejudice and are not involved in this appeal.

while in the state's custody, and violation of fourteenth amendment liberty interests which the plaintiffs claimed existed by virtue of Washington statutes that require the DSHS to provide family reunification services.[3]

JURISDICTION

In February 1986, defendants Tyler and Bronson filed a motion in the district court to dismiss the plaintiffs' complaint on the ground of absolute immunity. The district court denied the motion. Subsequently, we decided *Meyers* and *Coverdell*. In 1988, Tyler and Bronson moved for summary judgment. They contended they were entitled to absolute immunity, as well as qualified immunity.

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[3] The plaintiffs also included state claims in their complaint. These claims was dismissed by the district court and were pursued by the plaintiffs in Washington state court. In their state case, the plaintiffs alleged causes of action based on negligence, outrageous conduct, alienation of affection, and the violation of federal civil rights under color of state law, 42 U.S.C. § 1983. The Washington superior court granted summary judgment in favor of the defendants and dismissed all of the plaintiffs' claims. *Babcock v. State*, 768 P.2d 481, 486 (Wash. 1989). Because the section 1983 action was then pending in the federal district court, the plaintiffs did not appeal the state court's dismissal of it. *Id.* They did appeal the dismissal of the other claims. *Id.* The Supreme Court of Washington affirmed dismissal of the claims on the ground that the caseworkers were entitled to absolute immunity. *Id.*

Because we hold that the defendant caseworkers are entitled to absolute immunity under applicable Supreme Court and Ninth Circuit authority, we do not consider the separate question of whether the Washington Supreme Court's decision should be given preclusive effect on the issue of federal immunity in this section 1983 suit.

The district court ruled on the defendant's motion for summary judgment in its order dated January 11, 1988. In that order, it also reconsidered its earlier ruling by which it had denied the defendant court's reconsideration of its earlier order was prompted by our decisions in *Meyers* and *Coverdell*. The district court denied the defendants' motion for summary judgment, and refused to dismiss the case on the ground of absolute immunity.

Tyler and Bronson appeal from the district court's January 11, 1988 order. The plaintiffs move to dismiss the appeal on the ground that it is not timely as to the issue of absolute immunity, because, they contend, the 1986 order which initially denied the motion to dismiss is the order from which an appeal of the absolute immunity ruling should have been taken, and as to that order the appeal is untimely; and in any event, they argue of the January 11, 1988 order is an impermissible appeal from an interlocutory order.

We deny the motion to dismiss the appeal. In making its January 11, 1988 order, the district court reconsidered its earlier 1986 order and reached the merits of the case-workers' claim to absolute immunity. Reconsideration was appropriate in view of the intervening *Meyers* and *Coverdell* decisions as the district court discussed in its January 11, 1988 order. *See Kennedy v. LeFebvre*, 847 F.2d 482 (8th Cir. 1988). Having reconsidered the merits of the defendant's claim to absolute immunity, the district court rejected the defense, resolved the issue against the defendants, and denied the motion for summary judgment. Thus, the appeal from the January 11, 1988 order raises

the issue of the defendants' entitlement to absolute immunity, and the appeal is timely.[4]

With regard to the plaintiffs' argument that this appeal is not taken a final judgment, we agree this is the posture of the case. However, a district court's "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). The plaintiffs argue that *Mitchell* permits an appeal from an interlocutory order denying absolute immunity only if the issue being appealed is a "purely legal" one.

In Mitchell, the Court stated that "A district court's denial of a claim of *qualified* immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530 (emphasis added). The Court placed no such limitation on an interlocutory appeal from an order denying *absolute*

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[4] Plaintiffs rely on *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984), in support of their contention that we can only review in this appeal "new matter" raised in the defendant caseworkers' 1988 motion. This reliance is misplaced. Without deciding whether the plaintiffs' characterization of *Sierra On-Line's* footnote 4 is correct, we note that there were intervening decisions from this circuit which caused the district court to reconsider it earlier order. Thus, there was "new matter" for the district court to consider, and it did so. This "new matter" was the effect of our *Meyers* and *Coverdell* decisions on the defendants' claim to absolute immunity, the very issue we consider in this appeal.

immunity. *See id.* at 525. Nevertheless, we do not have to resolve the question whether an appeal from an interlocutory order denying absolute immunity must relate only to a district court's determination of an issue of law. Here. there is no dispute that the children were the subjects of child dependency proceedings which began in Louisiana and were transferred pursuant to interstate compact to Washington. Nor is there any dispute that all of the defendant's actions of which the plaintiffs complain were taken during the course of the Washington child dependency proceedings. The question is whether, under facts which are not in dispute, or which may be conceded for purposes of this appeal, the defendants are entitled to absolute immunity. This is an issue of law.[5] *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc).

It is well established that judges, advocates and witnesses enjoy the absolute immunity from liability for acts performed in judicial proceedings, "to assure that [they] can perform their respective functions without harassment or intimidation." *See Butz v. Economou*, 438 U.S. 478, 512 (1978). Similarly, prosecutorial immunity protects acts taken " 'in initiating a prosecution and in presenting the state's case.' " *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). Prosecutorial immunity, like judicial immunity, is absolute rather than qualified in order to

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[5] Because we resolve this dispute on the basis of absolute immunity, we do not consider whether this court has appellate jurisdiction over the issue of qualified immunity or whether defendants were entitled to qualified immunity.

permit performance without fear of litigation. *Imbler*, 424 U.S. at 424.

Absolute immunity from liability under 42 U.S.C § 1983 has been accorded state employees responsible for the prosecution of child neglect and delinquency petitions, the guardian ad litem who serves as an advocate for the children in such proceedings, and psychologists and psychiatrists who provide information and findings for use in the proceedings by the State Department of Social Services, *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984). Such persons are accorded absolute immunity because their participation in the court proceedings is an integral part of the judicial process. *Id. See also Briscoe, v. LaHue*, 460 U.S. 325, 345-46 (police officer as witness). In contrast, police officers have been denied absolute immunity in their submission of affidavits in support of warrants on the theory that this function is too removed from the judicial process. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Thus, the crucial inquiry in resolving a claim of absolute immunity is whether the function for which immunity is claimed is so much an integral part of the judicial process that to deny immunity would disserve the broader public interest in having participants such as judges, advocates and witnesses perform their respective functions without fear of having to defend their actions in a civil lawsuit. *See Butz*, 438 U.S. at 512.

Applying this rationale, we have extended absolute prosecutorial immunity to social service caseworkers in initiating and pursuing child dependency proceedings, *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir.), *cert. denied*, 108 S.Ct. 98 (1987), and in seeking and obtaining a court order for the seizure

and placement of a newborn child, *Coverdell v. Dep't of Social & Health Servs.*, 834 F.2d 758, 764 (9th Cir. 1987). We have also held that a child protective services worker who executes a court order for seizure and placement of a child is entitled to absolute quasi-judicial immunity. *Id.* at 765.

The plaintiffs argue that in contrast to the broad public policy underpinning the doctrine of absolute immunity, and our application of this policy in *Meyers* and *Coverdell*, the acts of the caseworkers in the present case exceeded the boundaries which limit the reach of absolute immunity. They contend that absolute immunity in the case now before us may only be extended to the initiation of dependency proceedings in Louisiana, not to any acts which occurred thereafter in Washington. They also assert that defendant caseworker Tyler conspired with Lee Michael to engineer a state court decision which placed the children in the custody of the Michaels. The plaintiffs further contend that Tyler and Bronson acted outside the scope of their protected functions when, without any court order, they took it upon themselves to make placement changes of the children.

It is undisputed that neither Tyler or Bronson participated in the initiation of the dependency proceedings. The proceedings were initiated in Louisiana. The girls were "adjudicated children in need of care [and] placed in the care and custody of the State of Louisiana, Department of Health and Human Resources" by order of the Louisiana court on September 3, 1981. The Louisiana court then placed the children with Willis and Elizabeth Babcock in Richland, Washington.

On November 5, 1981, the Washington court accepted jurisdiction over the girls "due to their current placement in the care of their paternal grandparents who reside in Benton County[, Washington]." From this point on, the DSHS Service Episode Record (the "SER"), in which the Washington caseworkers recorded their notes as the case progressed reveals numerous and extensive interviews with the Babcocks, the Michaels, the children and others. The SER also reflects visits by caseworkers to the Babcocks' and Michaels' homes to conduct home studies, and it shows that Tyler and Bronson gathered extensive information bearing upon placement of the children. The caseworkers also made recommendations for the placement of the children and testified in court on behalf of the DSHS.

The plaintiffs argue that Tyler's and Bronson's involvement in the case occurred during the "post-adjudication reunification phase of [the] dependency" proceedings. They characterize this involvement as consisting of "purely administrative or ministerial" acts performed by the caseworkers in connection with the supervision and placement of the children. And they contend such activity is not protected by absolute immunity. We disagree.

Dependency proceedings include post-adjudication activities as well as acts by which the proceedings are initiated. *See Meyers*, 812 F.2d at 1157. The reason for this is apparent. Caseworkers' duties do not end with the adjudication of child dependency. Depending on state law, caseworkers will have various statutory duties to perform during the time between the initial adjudication of dependency and final disposition of a case. *See* R.C.W. 13.34.120 (1983). In Washington, the dependency process

does not end until six months after the dependent child returns home. R.C.W. 13.34.130 (1983). Throughout this process, caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision, *Meyers*, 812 F.2d at 1157. There is little sense in granting immunity up through adjudication of dependency, and then, exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders. These post-adjudication actions by social caseworkers may or may not be prosecutorial in nature. *See Coverdell*, 834 F.2d at 764; *cf. Meyers*, 812 F.2d at 1156. In any event, however, all of Tyler's and Bronson's actions of which the plaintiff's complain were taken in connection with, and incident to, ongoing child dependency proceedings. Whether their immunity is characterized as quasi-prosecutorial or as quasi-judicial, *see Coverdell*, 834 F.2d at 765, Tyler and Bronson are entitled to absolute immunity.

The plaintiffs assert that Tyler should not be entitled to immunity because she conspired with Lee Michael to skew the DSHS recommendation in favor of the Michaels and to obtain a court order placing the children in the Michaels' home. We reject this contention. A social caseworker's entitlement to the defense of absolute immunity in the performance of her duties incident to child dependency proceedings cannot be defeated by allegations that the caseworker conspired with one of the parties to affect

the outcome of the case. The Supreme Court has recognized that with regard to prosecutors,

> [T]his immunity does leave the genuinely wronged defendant without civil redress [under section 1983] against the prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Imbler, 424 U.S. at 427-28. The performance of a social-worker's duty in child dependency proceedings is no less entitled to the protection of absolute immunity than is the performance of a prosecutor's duty in a criminal proceedings. *Coverdell*, 834 F.2d at 762-63. Their immunity must be absolute to permit them to perform their duties without fear of even the threat of section 1983 litigation. *Id.*

Plaintiffs also contend that even it Tyler and Bronson are entitled to immunity with regard to their placement recommendations, they should not be accorded immunity for two temporary placements of the children which they made without a court order.[6] These two instances of

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[6] During October 1981, Aryn Long ran away from the elder Babcocks' home twice. Following there incidents, Tyler placed Aryn in a licensed foster home under the supervision of Marilyn Wallace. Wallace was a secretary at the school attended by the girls. Angela Long asked to be placed in the Wallace home with his [sic] sister. Tyler acquiesced, and in December 1981, Angela also was placed in the Wallace foster home. This was a temporary placement until the Long girls

(Continued on following page)

placement, however, do not affect the result in this case. Tyler's temporary placement of the Long girls in a licensed foster home without a court order did not result in any harm. Bronston's temporary placement of the Babcock girls in the Michaels' home in April 1982 without a court order did not result in any harm during the period of that temporary placement; the sexual abuse occurred after the Washington juvenile court made its order in May 1982 confirming Bronson's placement of the children with the Michaels.

CONCLUSION

Defendant's Tyler and Bronson are entitled to absolute immunity. As we have previously stated, "the policies in support of immunity can only be fulfilled if immunity is freely granted and the exceptions are few and narrowly drawn." *Ashelman*, 793 F.2d at 1079. This case meets the criteria for the application of the doctrine of absolute immunity as articulated by us in *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154

(Continued from previous page)

were placed in the Michael's home as a result of the March 31, 1982 Washington Juvenile Court hearing. At the time this hearing, the Babcock girls were in Washington. The temporary order for placement of the Long girls in the Michaels' home did not extend to the Babcock girls; their placement was deferred pending a continuance of their case for further hearing. The Babcock girls returned from Wisconsin to Washington in April 1982, and, without a court order, the defendant Bronson placed them in the Michaels' home with the Long girls. This was a temporary placement which was confirmed by the juvenile court by an order made at a hearing held May 4, 1982.

(9th Cir.), *cert. denied*, 108 S.Ct. 98 (1987), and *Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758 (9th Cir. 1987).

REVERSED and **REMANDED** with instructions to dismiss the action.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUDOLPH BABCOCK, et al., Plaintiffs, vs. WANDA TYLER, et al., Defendants.	NO. C-84-271-SPM ORDER (Filed Jan. 11, 1988)

BEFORE THE COURT are plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 287) and defendant's Motion for Summary Judgment (Ct. Rec. 285). A hearing was held on November 24, 1987. Michael R. Seidl and Robert J. Crotty appeared for plaintiffs; Owen F. Clarke, Jr. and Michael E. Grant represented defendants. The court makes the following rulings based upon the original and supplemental briefing by the parties and the oral arguments of counsel. The factual basis of this suit has been related by this court in previous orders and will be discussed here as relevant to the various legal issues.

A. Protection Claim

In their Motion for Partial Summary Judgment, plaintiffs Angela (Long) Frederiksen, Beth and Erika Babcock (the girls) contend that because they had been placed with the Michaels as the result of State action, defendants, as State actors, owed them a duty of adequate protection such as afforded to prisoners. The incarceration claims arise under the Eighth Amendment's prohibition of cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97 (1976). The Estelle-type claim has been

extended under Fourteenth Amendment auspices to instances of a "special relationship" between the state actors and the plaintiffs. A child who is a ward of the State has been held to possess such a protected right to be free from foreseeable injury. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Doe v. New York City Dept. of Soc. Servs., (Doe I), 649 F.2d 134 (2d Cir. 1981). Defendants do not respond to this portion of plaintiffs' motion, but it seems clear that the girls have a protected right to be free from the type of harm which befell them here. The crucial question, however, is whether defendants' actions were the legal cause of the injury suffered by the girls.

The issue then becomes what level of conduct is required to hold defendants liable. Plaintiffs assert that they must show defendants acted with deliberate indifference to plaintiffs' safety. Such is the standard under the Eighth Amendment and that applied by the Taylor court to the county officials charged with failing to protect a foster child from abuse by the foster mother. 818 F.2d at 795. See Doe I, supra. However, in Doe v. New York City Dept. of Soc. Servs. (Doe II), 709 F.2d 782, 789 (2d Cir. 1983), the court discussed whether the standard announced in Youngberg v. Romeo, 457 U.S. 307 (1982), which was decided subsequent to Doe I, was applicable to claims of inadequate protection by a caseworker. In Youngberg, a case dealing with an involuntarily committed retarded adult, the court held that a professional's decision would be presumed correct and liability could be found only by demonstrating that the decision was such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision

on such a judgment." Id. at 323. The court held that the lower courts erred in applying the Eighth Amendment standard to that factual situation. Id. at 325. The Doe II court interpreted the Youngberg standard to be one of gross negligence. 709 F.2d at 790. Rather than deciding the exact nature of the standard, the court reasoned that even if the Youngberg decision did apply outside of an institutional setting, the deliberate indifference standard, which was satisfied in Doe I, may have been more stringent, and thus refused to reconsider its prior decision. Id.

The only Ninth Circuit case in this general area discusses both the deliberate indifference and the Youngberg professional judgment standards, without recognizing or resolving any apparent conflict between them. Gibson v. Merced Cy. Dept. of Human Resources, 799 F.2d 582 (9th Cir. 1986). Plaintiff there brought a claim against the county under 42 U.S.C. § 1983 alleging that her removal from a foster home had adversely affected her medical condition. The court assumed, without deciding, that a foster child has a right to be free from the arbitrary infliction of harm by the state, but found that the county had not acted with deliberate indifference to her medical needs. Id. at 589. The court further found, however, that the county's decision to remove plaintiff also did not violate her constitutional rights under the Youngberg analysis. Id. at 590.

In the present case, it seems that the factual trigger of the protection claim is the defendants' failure to adequately investigate Lee Michael's criminal history. Under either the Estelle or Youngblood standard, the court concludes that neither side is entitled to summary judgment on the question of whether defendants' actions were of

such a character to violate plaintiffs' constitutional rights. This court cannot conclude as a matter of law that defendants exhibited deliberate indifference or acted in substantial departure from professional standards. In light of evidence that criminal checks were run on other temporary custodians and other evidence, the court does find that a reasonable jury could conclude that the failure to investigate the criminal background of a foster parent could give rise to a constitutional violation. Plaintiffs' and defendants' motions for summary judgment are DENIED in regard to this claim.

B. Roth Due Process Claim

Plaintiffs contend that the girls and Rudy Babcock have a state-created liberty interest in the protections and procedures embodied in the Washington child custody laws. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court recognized that an individual may have a federally protected right to benefits conferred under state law. The Eleventh Circuit utilized this theory to find that a foster child had a protected due process liberty interest in services and safeguards established by Georgia child welfare laws. Taylor, supra, 818 F.2d at 794.

The central issue in determining whether a state law creates a federally protected interest is whether the language is mandatory in nature so as to create a reasonable expectation of entitlement to the interest. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Allen v. Board of Pardons, 792 F.2d 1404 (9th Cir. 1986). A review of the Washington dependency statutes demonstrates that the agency charged with the

care of a dependent child is required to provide certain services in furtherance of certain specified goals.

In the introductory provision of the statutes, the following legislative policy is found:

> The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact in the absence of compelling evidence to the contrary.

RCW 13.34.020. In keeping with this policy, upon removal of a child from his or her home, the agency charged with the child's care "*shall* provide the court with a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what actions the agency will take to maintain parent-child ties." RCW 13.34.130(2). "This plan *shall* specify what services will be offered to the parent and what requirements must be met in order to facilitate resumption of custody by the parent." RCW 13.34.130(2) (a). "Such services shall actually be provided to the parent and maximum parent-child contact is to be encouraged." RCW 13.34.130(2) (b) (c). (All emphasis added.) The repeated use of the word "shall" clearly shows the mandatory nature of the agency's actions. Accordingly, plaintiffs had a "legitimate claim of entitlement" to the services and process established in the Washington dependency statutes. See Roth, supra, 408 U.S. at 577.

Mr. Babcock is the natural father of Erika and Beth. He is the step-father of Angela, and although he raised

her for several years, he never established a legal relationship with Angela. The Washington dependency statutes delineate the rights of a "parent" in those proceedings. The word "parent" for purposes of Chapter 13.34 means the biological or adoptive parents of a child. RCW 13.04.011. Accordingly, Mr. Babcock does not have a state created right to his association with his step-daughter, Angela. Nonetheless, this court previously recognized that Mr. Babcock has a clearly established right under the First Amendment to familial relationship with his natural daughters and with Angela (Ct. Rec. 238). Thus, this court must determine whether defendants' actions violated the Washington statutory scheme and/or also impermissibly interfered with Mr. Babcock's First Amendment rights.

1. Transfer of Jurisdiction.

Plaintiffs protest the transfer of jurisdiction over the girls from Louisiana to Washington without notice or hearing. The transfer occurred pursuant to the Interstate Compact on Placement of Children (ICPC). RCW 26.34 (Ct. Rec. 289, App. A). Plaintiffs contend that in order for Washington to accept jurisdiction over the girls' placement, a dependency petition must be filed and that the caseworkers are responsible for initiating such proceedings.

In support of their theory, plaintiffs cite to Chapter 30 of Manual G, a manual of Department of Social & Health Services (DSHS) regulations, which relates to the ICPC (Ct. Rec. 139, Ex. 9). Plaintiffs contend that these regulations mandate that Washington may assume jurisdiction under the ICPC only by the initiation of a dependency

proceeding. The regulations, however, are notably silent on the method for asserting jurisdiction over a dependency-type situation initiated in another state. The only mention of such is in § 30.98, which states:

> The service worker may confer or coordinate with:
>
> A. Juvenile courts to:
>
> . . .
>
> 2. Establish court jurisdiction of a child (e.g. dependency petition, Chapter 23).

(Ct. Rec. 139, Ex. 9, p. 5). Neither the statutes regarding the ICPC, RCW 26.34 (Ct. Rec. 289, App. A) or that relating to dependency proceedings, RCW 13.34 (Ct. Rec. 289, App. B) specify the procedure for transferring jurisdiction from the sending state (Louisiana) to the receiving state (Washington). Because there is no clearly-defined process which is required for such a transfer, this court concludes that plaintiffs do not have a state created interest in receiving notice of such an intent to transfer jurisdiction. Accordingly, any involvement by defendants in obtaining the *ex parte* order transferring jurisdiction on November 5, 1981 (Ct. Rec. 139, Ex. 7) could not be the basis of liability against them.

The court also concludes that this transfer of jurisdiction did not impinge upon plaintiffs' First Amendment right. The interruption of the familial relationship already had occurred and the Benton County order merely changed the supervising court. The court DENIES plaintiffs' motion for summary judgment as it relates to the

transfer of jurisdiction, but GRANTS defendants' motion as it relates to the same.

2. Removal of the Girls From the Home of Willis and Elizabeth Babcock.

In its oral ruling, the Louisiana court placed the girls with the Louisiana Office of Human Development and directed it to transfer the custody of the children to the equivalent agency in Washington for placement with the grandparents (Ct. Rec. 136, Ex. C, p. 490-91). This oral ruling, however, was not presented to the Benton County court until sometime subsequent to that court's acceptance of jurisdiction. The written order from the Louisiana court transferring jurisdiction makes no mention of placement with either the Babcocks or any state agency (Ct. Rec. 139, Ex. 6). No mention of the placement was made during the Benton County hearing regarding the jurisdictional transfer (Ct. Rec. 136, Ex.D, Vol. I, p. 4).

Benton County accepted jurisdiction based in part on the Louisiana order placing the children with the paternal grandparents, who resided in that county, and on its statement that the parties agreed to that placement (Ct. Rec. 139, Ex. 7). The order further stated that the court accepted jurisdiction due to the girls' current placement with the elder Babcocks.

In fact, however, on November 5, 1981, when the Benton County order was signed, Aryn Long was no longer residing with the Babcocks. Because that fact was not stated in the Benton County order and had apparently never been brought to the court's attention, defendant Taylor and other caseworker determined that a copy

of the Benton County order would not be distributed to the families (Ct. Rec. 289, Ex. 32).

Defendants contend that the girls were under the care, custody and control of DSHS and not the senior Babcocks, and thus defendants did not need to notify anyone or obtain a court order prior to changing the girls' placement. Defendants cite two cases in support of their theory that no notice was necessary in this situation. The first case, In re Lowe, 89 Wn.2d 824, 576 P.2d 65 (1978), involved a delinquent youth committed to the care of DSHS under RCW 13.04. In that case, the juvenile court had ordered that the minor not be transferred from one institution to another without prior court approval. The court remanded the action to the juvenile court, stating:

> Thus, the juvenile court in committing a juvenile to the department may not prescribe requirements that must be followed by department, except that it may direct that it receive notice in advance of specified action by department. In this case, the court might properly have required notice of the intended placement decision.

Id. at 827.

The Court of Appeals in In re Gakin, 22 Wn. App. 822, 592 P.2d 670 (1979) extended the reasoning of the Lowe court from delinquencies to dependencies. In ruling that the juvenile court could not order DSHS to provide a dependent minor with specific types of treatment in a specific facility, the Gakin court cited the language in Lowe which provided that following commitment of a juvenile to the care and custody of the department, the juvenile court's jurisdiction is limited to: (1) revoking or

modifying its order of commitment, or "(2) upon proper petition and hearing, modify[ing] or set[ting] aside department's decision on placement or transfer of the juvenile." Id. at 824 (quoting Lowe, 89 Wn.2d at 827.)

Both of the above cases cite to RCW 13.04.095, which defined the power of the court to commit a delinquent or dependent child to DSHS. That statute was repealed effective July 1, 1978. Also, in 1978 the statute governing modification of court orders was amended and recodified. The current statute provides: "Any order made by the court in the case of a dependent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper." RCW 13.34.150. Additionally, the statute which gives the parent the right to participate and be represented "at all stages of a proceeding in which a child is alleged to be dependent" became effective in July 1978. RCW 13.34.090.

RCW 13.34.130 controls the court's options in order a disposition of a child found to be dependent. In regard to the present situation where the girls were to be removed from their home, the court could have ordered them into the care, custody and control of (1) a relative; (2) DSHS; (3) a licensed child-placing agency; or (4) a home not required to be licensed. RCW 13.34.130(1)(b). The Benton County court accepted jurisdiction over these girls based upon their current placement with their paternal grandparents, who were residing in Benton County (Ct. Rec. 139, Ex. 7). The court did not order them into the care, custody and control of DSHS with placement in the grandparents' home, but rather referred only to the

grandparents. In fact, other than the notice of presentment signed by a DSHS attorney, the agency is not mentioned at all in the court's order.

A review of the Washington and Louisiana statutory schemes shows that the Louisiana finding of "in need of care" is closely akin to a Washington dependency determination. Pursuant to the "in need of care" decision, the Louisiana court orally placed the girls in the care of that state's agency which is equivalent to the Washington DSHS, with placement at the home of the grandparents. It was the jurisdiction over that placement which was transferred to Washington. However, the record reveals that the Benton County court had not seen a copy of the Louisiana court's oral ruling on this matter, but, rather, had only that court's written order which made no mention of the agency or its custody. Thus, at this time a factual issue remains regarding whether the girls were placed under the care, custody and control of DSHS.

If the girls were placed with DSHS, it is this court's impression, but not ruling, that they could be removed from the Babcocks' without notice. If they were not, however, DSHS could obtain care, custody and control of the girls only by obtaining an order modifying the previous order which states that the girls are placed with their grandparents. Because no such modification had been obtained at the time Erika and Beth were removed or at any subsequent time, the defendants would have no authority to remove the girls from the senior Babcocks' care. Because of the remaining factual disputes, the court DENIES both plaintiffs' and defendants' motions for summary judgment as to the removal of Erika and Beth.

In regard to Angela, however, as stated above, Mr. Babcock does not have a state created liberty interest and, thus, may not complain about statutory violations related to her removal. Because Angela already had been removed from Mr. Babcock's custody, the court does not find that changing her from one foster care placement to another without notice and hearing violated Mr. Babcock's First Amendment rights. Mr. Babcock has not shown that he had less access to his step-daughter once she was removed from his parents' home. Accordingly, defendants' motion as it relates to Mr. Babcock's claims on Angela's removal, is GRANTED, and Mr. Babcock's motion is DENIED. Angela, however, would be covered by the statute and, thus, would be protected by the statute. In light of the factual questions discussed above, both Angela and defendants' motions are DENIED in regard to her removal.

3. Placement Decisions.

Plaintiffs contend they were entitled to an evidentiary hearing similar to that held in Louisiana prior to placement of the girls with the Michaels. Although the court finds that the Benton County court was not required to relitigate the issue of the girls' dependency, the court does conclude that certain processes were required throughout the handling of this matter.

Once jurisdiction was established in Washington, plaintiffs had a protected right in obtaining the services due them under the Washington dependency statutes. In essence, it is this alleged failure to follow the statutory mandates which most deeply troubles plaintiffs. As noted

above, the Legislature found that the primary purpose of the dependency statutes was to preserve the family unit. The statutes repeatedly refer to the duties of the agency charged with the care of the minor to work toward reunification of that entity. In order to achieve the goal, the law provides that the caseworker shall devise a plan and set forth requirements which lead to the eventual placement of the child with the parent, if such is possible.

A review of the Service Episode Record (SER) reveals evidence that could support a finding that the present defendants were not always working toward this statutory goal. The Louisiana court, after several days of testimony, concluded that reunification of the family would be difficult if the children were placed with the Michaels, in light of the hostility evident between the father, Rudy Babcock, and the Michaels. Thus, the girls were ordered into the care, custody and control of the Louisiana social agency with physical placement in the senior Babcocks' home. On August 20, 1981, in the initial intake in Washington by DSHS caseworker Jan Palmer, there is a notation regarding a phone call from a Louisiana caseworker in which that caseworker indicated she recommended that the children be placed with the Michaels (Ct. Rec. 136, Ex. B, p. 1).

The first recording of an individual service plan was made by defendant Tyler in September 1981. Defendant there noted that a complete home study should be done on both the senior Babcocks' and the Michaels' homes (Ct. Rec. 136, Ex. B, p. 5). Throughout the rest of the record, virtually every entry has some connection to the Michaels. Moreover, it is clear from these entries that

defendants were or should have been aware of the antagonism between Rudy Babcock and the Michaels. The caseworkers supported the Michaels in their attempts to contact the girls and, in fact, on occasion, counseled the girls that they should not tell their grandparents or their father of their communication with the Michaels.

Little mention is found in the SER of what steps were being taken to reunite the girls with their father. The court acknowledges that Rudy Babcock's absence from the local area may have burdened defendants' ability to provide services to him, but defendants have failed to point the court to any evidence that they were attempting to achieve the statutory goal of preserving the family unit.

Although this court cannot conclude as a matter of law that defendants' actions exhibited deliberate indifference toward the girls and Mr. Babcock's constitutionally protected rights to reunification services, it does conclude that a genuine question of fact exists regarding whether defendants were so violative as to allow this issue to go to a jury. Moreover, the court finds that even though Mr. Babcock was not entitled to these statutory benefits in regard to Angela, there is a material issue of fact regarding whether defendants' actions represented deliberate indifference to his fundamental right of protection of the family unit. Both parties' motions for summary judgment are DENIED as to this ground.

4. Creation of Michael Guardianship.

This guardianship was created only as to Angela. Because Mr. Babcock does not fit into the statutory definition of a parent, he cannot claim entitlement to the process set forth in the guardianship provisions. RCW 13.34.230-.236. The court must determine, however, whether the defendants' actions were violative of his fundamental familial rights.

Mr. Babcock contends he did not receive notice of a guardianship hearing. A review of the Benton County transcript, however, reveals that Mr. Babcock and his attorney were present at the dependency review hearing when evidence was taken and arguments were made regarding the Michael guardianship (Ct. Rec. 136, Ex.D, Vol. 1, pp. 48-165). At that hearing, Mr. Babcock and his attorney fully participated by cross-examining, calling their own witnesses and presenting argument. Whether or not this hearing was formally designated as a guardianship hearing, it is clear that Mr. Babcock was given amply opportunity to contest the guardianship prior to its establishment. Mr. Babcock is not entitled to summary judgment on this basis, but, rather, such should be entered for defendants.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment presents five separate issues. The first three have some cross-relationship and will be set forth initially:

1. The Benton County Superior Court's rulings as to state law claims, and as to the lack of requisite intent or deliberate indifference necessary to show violations of civil rights, are *res judicata*.

2. The Benton County Superior Court was correct in ruling that plaintiffs failed to show the requisite intent or deliberate indifference necessary to maintain a civil rights action against defendants Tyler and Bronson.

3. The plaintiffs' constitutional claims are for violations of procedural due process, subject to the limitations of Daniels and Davidson.

As to 1, this court has previously decided, in an opinion and order filed April 20, 1987 (Ct. Rec. 272) that since plaintiffs did not freely and without reservation elect to litigate fully the federal issues in state court, they have a right to return to federal court on the federal issues. The court relied principally upon Colorado River Waver [sic] Conservation Dist. v. United States, 424 U.S. 800 (1976), and Tovar v. Billmeyer, 609 F.2d 12391 [sic] (9th Cir. 1980). This would logically include determination of all elements and issues of the federal litigation. It would be an empty right to be able to return to federal court if the state court's ruling on state issues controlled the decisions of the federal court on federal issues. The state court rulings on state claims are, of course, entitled to *res judicata* effect.

The issue of whether return to federal court is permissible is a close one, since plaintiffs filed a complaint in state court which included these federal claims. It can be argued that this constituted a voluntary election to fully

litigate the federal issues in state court. However, plaintiffs later vacations as set forth in the Order Granting Plaintiffs' Motion to Lift Stay in Proceedings (supra, p. 3, 4, 5) seem to the court to show clearly an intent and purpose to litigate all federal questions in federal court. That, the court believes, is sufficient to bar preclusive effect to the state court decision.

The court concludes that there is evidence in the record from which a trier of fact could determine that the acts or omissions of which plaintiffs claim, were performed either intentionally or with deliberate indifference to known rights. The court is not bound, as to these federal claims, by any conclusion of the state court that nothing more than negligence can be involved in these claims. Further evidentiary hearing gives the court an opportunity to determine precisely the nature and sources of the claims, now a matter of serious dispute between the parties.

The issue presented in 2, above, whether the Benton County Court was correct in its rulings as to the existence of intent or deliberate indifference as to state claims, does not concern this court. It has no appellate function as to the state claims, and as indicated earlier, concludes that it is not bound by any state court decisions on the elements of the federal claims.

As the court has mentioned in previous opinions in this case, in a § 1983 action in federal court, collateral estoppel or *res judicata* effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or

unwillingness to protect federal rights. Haring v. Prosise, 462 U.S. 306 (1983). As plaintiffs have urged, if this court did not apply England, supra, this would require a full hearing as to the adequacy of plaintiffs' opportunity to litigate their claims in state court and as to the state court's willingness to protect federal rights. While a federal court must face this disagreeable task if the facts require it, this court's application of the England exception to *res judicata* makes it unnecessary here.

In 3, above, defendants urge that the doctrines of Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), hold that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. Defendants assert that plaintiffs' constitutional claims are for procedural due process, subject to the limitations of Daniels and Davidson. Plaintiffs vehemently dispute this. It is not necessary to decide this controversy in advance of trial, because the court has already determined that the nature of defendants' conduct (whether negligent, intentional, deliberately indifferent or none of these) will be decided during the course of the federal litigation. This issue can be raised again at an appropriate time during the trial.

Defendants' next issue is:

4. Even if an actionable civil rights claim existed, plaintiffs have failed to raise any facts which would deprive defendants Tyler and Bronson of immunity.

The court has previously decided 12(b)(6) motions raising the issues of absolute and qualified immunity.

Defendants now move for summary judgment, claiming the undisputed facts support their motion.

ABSOLUTE IMMUNITY

In this court's Order Partially Granting and Partially Denying Defendants' Motions for Dismissal, filed February 13, 1986 (Ct. Rec. 128), this court declined to hold social workers absolutely immune for functions other than prosecutorial, which it considered to be removing children from homes, filing petitions charging child abuse or neglect, and testifying in such cases. Of course, actions taken by social workers under court order would also be absolutely immune.

Later decisions of the Court of Appeals for the Ninth Circuit have been to the effect that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." Meyers v. Contra Costa County Dept. of Soc. Servs., 812 F.2d 1154 (9th Cir. 1987); Coverdell v. Department of Soc. & Health Servs., No. 86-3825 (9th Cir., slip op. filed December 15, 1987). In this case, there will be evidence of numerous acts or failures to act by defendants not within the above framework, and claimed by plaintiffs to constitute constitutional violations. As to the non-prosecutorial functions, defendants are not entitled to absolute immunity.

The court confesses some concern in this area. Under the later cases, absolute immunity relates to dependency proceedings, broader in scope than child abuse or

neglect. Also, absolute immunity attaches to quasi-prosecutorial functions connected with the initiation and *pursuit* or dependency proceedings.

While no dependency proceedings were instituted in the state of Washington, it would appear the Louisiana proceedings were the functional equivalent of Washington's dependency proceedings. Upon transfer of jurisdiction, the children plaintiffs may have had the status of dependent children, even though the relevant regulations had not been followed. However, it remains to be determined what actions of defendants were in *pursuit* of dependency proceedings and which were quasi-prosecutorial in character. The court will welcome further discussion of this issue after precise evidence is on the record.

QUALIFIED IMMUNITY

The court believes that defendants' claim of qualified immunity is a reargument of the earlier motion considered and denied by this court in February 1986 (Ct. Rec. 129). The law has not changed. The additional allegations of fact by defendants are as to consultations with counsel before certain actions complained of by plaintiffs. These facts do not, in the view of the court, require a grant of qualified immunity. The specific evidence as to advice of counsel is, of course, relevant to the issue. It will be considered during trial, along with all other relevant testimony. Defendants are not entitled to qualified immunity as a matter of law.

Next, defendants argue:

5. Plaintiffs are collaterally estopped from alleging that removal of the children from Willis and Elizabeth Babcock's home and placement in the Lee Michael home was wrongful.

The court expresses its general agreement with the position taken by plaintiffs in their memorandum in opposition on this issue. We do not have complete transcripts of the prior actions. More important, the specific issues of fact and law claimed to be adjudicated have not been specifically laid out, and the review hearings were for the limited statutory purpose of determining whether court supervision should continue. There was no final decision on the merits; finally, this court would be extremely reluctant to apply collateral estoppel in advance of trial where a basic aspect of plaintiffs' allegations is that they did not have a full and fair opportunity to litigate in the state court.

CONCLUSION

Plaintiffs' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED in the following respects:

1. Plaintiffs' claims regarding transfer of jurisdiction are DISMISSED WITH PREJUDICE.

2. Mr. Babcock's claims regarding removal of Angela from the elder Babcocks' home is DISMISSED WITH PREJUDICE.

3. Plaintiffs' claims regarding creation of the Michaels guardianship are DISMISSED WITH PREJUDICE.

Defendants' motion for summary judgment is DENIED in all other respects.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.
